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No. 02-189

In The
Supreme Court of the United States

MITSUBISHI HEAVY INDUSTRIES, LTD.,

Petitioner,

versus

ANGELINA CANTUBA, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeal, Fourth Circuit Of The State Of Louisiana

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

In addition to the parties listed by Petitioners as being named by Plaintiffs as Defendants in this case, it should be noted that the parties in question, namely the American Bureau of Shipping, Ltd., the Salvage Association, Ltd. and Paul Francis Daniels are still parties to the proceedings; however, only the Petitioner, Mitsubishi Heavy Industries, Ltd., is bringing this Petition for a Writ of Certiorari. The remaining parties, the American Bureau of Shipping, Ltd., the Salvage Association, Ltd. and Paul Francis Daniels are currently scheduling depositions during the month of November, 2002 of the Plaintiffs in the objected to forum, Orleans Parish.

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REASONS FOR DENYING THE WRIT

I. PETITIONER HAS FAILED TO SHOW THAT AN ALTERNATIVE AVAILABLE FORUM EXISTS

Petitioner, Mitsubishi Heavy Industries, Ltd. (hereinafter "MHI"), has not met the requirement of demonstrating the existence of an adequate alternative forum. There is compelling authority for the proposition that the mover in *forum non conveniens* has an absolute burden to prove that there is an adequate available forum where all Defendants are amenable to jurisdiction and where Plaintiffs can reasonably prosecute their case. Respondents cite Wright, Miller & Cooper, *Jurisdiction* §3828:

> Dismissal on the basis of *forum non conveniens* requires that there be in fact an alternative forum in which suit can be maintained. The doctrine of *forum non conveniens* presupposes at least two forums, in which defendant is amenable to process.

Case citations indicating the mandatory nature of this demonstration include:

> *Gulf Oil Corp. v. Gilbert*, 67 S. Ct. at 842, 330 U.S. 506-507; *Turan v. Universal Plan Inv. Ltd.*, 70 F. Supp. 671 (E.D. La. 1999); *Perusahaan Umum Listrik Negara Pusat v. M/V TEL AVIV*, 711 F.2d 1231, 1238 (5th Cir 1983); *Watson v. Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 354 (6th Cir. 1985); *Denmark v. Tzimas*, 871 F. Supp. 261 (E.D. La. 1994); *Menendez Rodriguez v. Pan American Life Insurance Co.*, 311 F.2d 429 (5th Cir. 1962); *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668 (U.S. App. D.C. 1996); *Mercier v. Sheraton Intern, Inc.*, 981 F.2d 1345 (5th Cir. 1992).

It is the indispensable burden of the mover, then, to demonstrate the existence of an adequate alternative forum. As this is not done in this case, the motion to dismiss for *forum non conveniens* lacked the requisite foundation and both the Louisiana Fourth Circuit Court of Appeal and Louisiana Supreme Court recognized this fact.

Nowhere has MHI ever claimed that it has made the requisite showing of adequate available forum. This essential requirement of any *forum non conveniens* motion was and still is missing.

The Louisiana Fourth Circuit Court of Appeals and the Louisiana Supreme Court could not legitimately find the existence of an adequate, available forum where there was no evidence presented of same. Second, a finding of so-called "appropriate" *fora* is not what is mandated by law. The mover in a *forum non conveniens* motion must show adequate, available *fora* where all Defendants are amenable to process and the Plaintiffs have an opportunity to proceed. "In all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which defendant is amenable to process. . . . " *Gulf Oil Corp. v. Gilbert, supra*, at 506-507. This was not done in this case. A list of no less than four nations in which Defendant MHI speculates suit might be brought is insufficient.

The availability and adequacy of the proposed alternative forum must be proved either by affidavit or in some other competent fashion. Petitioner, MHI, has suggested that the substantive law of the foreign forum is presumed to be adequate, but this does not relieve Petitioner of its burden of proof as to particular proposed tribunals. Mover in a Motion to Dismiss for *forum non conveniens* cannot

simply toss out four nations where it imagines suit would be possible. In *Vaz Borralho v. Keydril Co.*, 696 F.2d 379 (5th Cir 1983), the United States Fifth Circuit Court of Appeals cited *Piper Aircraft Company v. Reyno*, 454 U.S. 235 (1981) for the following proposition:

> "Ordinarily, this requirement [of showing an alternative forum] will be satisfied when the defendant is 'amenable to process' in the other jurisdiction."
>
> (696 F.3d at 391)

This has never been accomplished by MHI. In particular, with respect to Defendant, Paul Francis Daniels, a Louisiana domiciliary, there is no showing that he is amenable to process in any of the four proposed forum nations, namely Canada, Japan, Greece or the Philippines. This problem has never been addressed by MHI. Mr. Daniels is not amenable to process in these other nations' courts and it is MHI's burden to meet the challenge of showing that there is the requisite jurisdiction over Mr. Daniels, as a necessary party to this litigation, in an alternative forum.

There is no stipulation in the record from Mr. Daniels that he would submit voluntarily to the jurisdiction of a court in Japan, Greece, the Philippines or Canada. Generally the conditions a defendant must follow are:

(1) consent to the jurisdiction of the foreign court;

(2) the foreign court must in fact exercise jurisdiction;

(3) agree to satisfy judgment by the foreign court;

(4) waiver of statute of limitations;

(5) agree to facilitate discovery;

(6) translation of documents;

(7) make witnesses available to the action in the foreign jurisdiction.

See, Wright, Miller, Cooper, *Jurisdiction* §3828, pp. 288-289, n. 34.

These requirements remain unsatisfied. MHI has not and cannot assert that all Defendants in this matter will agree to the terms enumerated above. It is Defendant's burden "to show that there is another existing forum and that this is actually so and not merely theoretically." Wright, Miller, Cooper, *supra*, at *Jurisdiction*, §3828, p. 290, n. 35, citing *Menendez Rodriguez v. Pan American Life Ins. Co.*, 311 F.2d 429 (5th Cir. 1962). Although MHI submitted a judgment for the trial judge to sign which listed four allegedly "appropriate" nations in which suit might be brought, this action alone is clearly insufficient to meet MHI's burden of proof.

Paul Francis Daniels has been a Defendant in this matter since the outset. Mr. Daniels is still in the case and will remain as a Defendant. Mr. Daniels is also a Louisiana domiciliary. He performed the last inspection on the vessel (in Brazil) before it sank. He is not amenable to service in the nations of Japan, Greece, the Philippines or Canada. He has not agreed to submit to the jurisdiction of the courts of those nations.

Mr. Daniels was added as a Defendant along with the Salvage Association, Ltd., and both are *bona fide* Defendants. Since Mr. Daniels is not amenable to process in Canada, the Philippines, Greece or Japan, and does not submit himself to same, these are not available, adequate

fora as to all Defendants. In fact, the American Bureau of Shipping, Ltd., the Salvage Association, Ltd. and Paul Francis Daniels are currently scheduling depositions of the Plaintiffs in the objected to forum, Orleans Parish, and have not joined in this Petition for a Writ of Certiorari.

LSA – C.C.P. art. 42 states: "An action against an individual who is domiciled in the state shall be brought in the parish of domicile. . . . " *Forum non conveniens* does not apply. Petitioner conveniently overlooks the fact that Mr. Daniels is local and that suit against a Louisiana resident must be brought in his own domicile. *Fidelity Deposit Co. v. Bussa*, 22 So. 2d 562 (La. 1945).

Because one of the main Defendants is a Louisiana domiciliary, Louisiana has a vital interest in this litigation, and there is a sound reason for keeping it there. With a Louisiana Defendant in a case, Louisiana's courts have a substantial reason to preside over its disposition. In *Fox v. Board of Supervisors*, 559 So. 2d 850 (La. App. 1st Cir. 1990), the Louisiana First Circuit Court of Appeal noted: " . . . since no Louisiana residents are involved in the litigation, the interest of the Louisiana judicial system in the litigation is slight." In the case at bar, Louisiana has a major interest in retaining the case and should do so.

The Defendant bears the burden of persuasion on all elements of the *forum non conveniens* claim. *Nolan v. Boeing*, 762 F. Supp. 680 (E.D. La. 1989). It is Defendant's burden to demonstrate that there is a more convenient forum available to accept the litigation. Without this affirmative demonstration, the motion to dismiss must fail. But, according to the Fifth Circuit, "A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum." 821 F.2d at 1164.

See also, *Turan v. Universal Plan Inv. Ltd.*, 70 F. Supp. 2 671 (E.D. La. 1999).

According to Wright Miller & Cooper, *Jurisdiction* §3828:

> "Dismissal on the basis of *forum non conveniens* requires that there be in fact an alternative forum in which suit can be maintained. The doctrine of *forum non conveniens* presupposes at least two forums, in which defendant is amenable to process."

See, *Gulf Oil Corp. v. Gilbert*, 67 S. Ct. at 842, 330 U.S. 506-507.

A *forum non conveniens* dismissal should never be granted unless the Defendant can satisfy the Court that an adequate and available alternative forum exists. See *Perusahaan Umum Listsik Negara Pusat v. M/V TEL AVIV*, 711 F.2d 1231, 1238 (5th Cir. 1983).

Dismissal predicated on *forum non conveniens* requires availability of an alternative forum possessing jurisdiction as to all parties. *Watson v. Merrell Dow Pharmaceuticals, Inc.*, 769 F.2d 354 (6th Cir. 1985). "This requirement is generally satisfied if the defendant is amenable to process in the foreign jurisdiction." *Denmark v. Tzimas*, 871 F. Supp. 261 (E.D. La. 1994).

This Court will read the Petition for a Writ of Certiorari in vain for any argument by MHI that Defendant, Paul Francis Daniels, is amenable to process or under the jurisdiction of any tribunal in Canada, Japan, Greece or the Philippines. Mr. Daniels inspected the vessel in Brazil. It was the last inspection thereof and is of critical importance. The inspection in Brazil does not create jurisdiction

in any of the places proposed by MHI as alternative courts. Because MHI fails to demonstrate that Defendant, Daniels, is within the jurisdiction of these courts and amenable to process as such, there is no requisite showing of an alternative available forum. In *Menendez Rodriguez v. Pan American Life Ins. Co.*, 311 F.3d 429 (5th Cir. 1962), the Fifth Circuit, as a corollary to the doctrine, announced in *Gulf Oil Corp. v. Gilbert, supra*, that:

> "At least two such forums must be open to the plaintiff before the doctrine comes into play; and they shall not be dependent merely upon the will or grace of the defendant, but must be provided by law."

This means that even if Defendant, Daniels, were willing to submit to jurisdiction in a forum proposed by MHI, unless he were amenable to service of process and jurisdiction in that place there would be no alternative forum under the rule of *Gulf Oil Corp. v. Gilbert*. MHI does not and cannot show that a Louisiana Defendant would be amenable to suit in the *fora* proposed. The stipulation under LSA – C.C.P. art. 123(C) provides merely that the Defendants "shall waive any defense based upon prescription or the statute of limitation that has matured since the commencement of this action. . . . " (See Petition for a Writ of Certiorari at A-4). It does not require a Defendant to consent to jurisdiction or service of process. Moreover, Petitioner has made no showing that the same rights to a trial by jury and to be fully compensated for all damages are available in any of the suggested alternative *fora*.

II. PETITIONER WAIVED ITS RIGHT TO ASSERT THE DEFENSE OF *FORUM NON CONVENIENS*

Petitioner, MHI, concedes that it could have filed its motion to dismiss under the new law on June 30, 1999, but delayed until November 2, 2000. MHI argues that this delay is acceptable, and that its filing of motions in the trial court over the period of this sixteen month interim does not constitute a waiver of venue and acquiescence in the jurisdiction of the court. MHI cites various discovery issues during the pertinent time period as the excuse for its failure to timely file a Motion to Dismiss for *Forum Non Conveniens*. Yet the existence of discovery disputes between the parties in no way prevented MHI from filing a Motion to Dismiss under the revised version of LSA – C.C.P. art. 123. Whatever discovery issues may have been pending are irrelevant. It was the duty of MHI to timely present its *forum non conveniens* motion. Instead, it continued to litigate discovery under the auspices of the court it now claims is an inconvenient forum for this case. That constitutes a waiver and acquiescence in jurisdiction.

There is a waiver when there is (1) an existing right, benefit or advantage; (2) knowledge of its existence and (3) actual intent to relinquish the right, which can be inferred from conduct. See *Salzstein v. Bekins Van Lines, Inc.*, 993 F.2d 1187 (5th Cir. 1993). MHI knew of its right in June of 1999 to seek dismissal, but filed pleadings and sought judicial relief from the very tribunal it now seeks to escape. MHI has waived *forum non conveniens*.

Authorities supporting the importance of a timely filing of a motion for *forum non conveniens* are abundant. According to the United States Court of Appeals for the Fifth Circuit:

> "We believe . . . that the better rule would be that a defendant must assert a motion to dismiss for *forum non conveniens* within a reasonable time after the facts or circumstances which serve as the basis for the motion have developed and become known or reasonably knowable to the defendant. See, *Wright, Miller & Cooper, Fed. Practice and Procedure*: Jurisdiction §3828, at 291 (2d Ed. 1986); Cf. *Creamer v. Creamer*, 482 A.2d 346, 352 (D.C. App. 1984); *In Re Air Crash Disaster Near New Orleans, La.* 821 F.2d 1147 (5th Cir. 1987).
>
> Further, "[U]ntimeliness . . . should weigh heavily against the granting of the motion to dismiss for *forum non conveniens* because a defendant's dilatoriness promotes and allows the very incurrence of costs and inconveniences the doctrine is meant to relieve." *In Re Air Crash Disaster Near New Orleans,* 821 F.2d 1147, 1165 (5th Cir. 1987), *rev'd on other grounds,* 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989).

In the view of the Fifth Circuit, "the moving defendant must submit its motion in a timely manner." 821 F.2d at 1165.

The Court then added guidance on how such timeliness should be evaluated.

> "We believe the time the motion is filed is the appropriate time frame for considering its validity rather than the time of the action's commencement. There are many factors that might bear on the granting or denial of the motion, e.g., discovery, stipulations, admissions, the joinder or dismissal of parties, which frequently develop or occur after the action commences. Thus, the relevant circumstances at the time of the motion is

> filed should serve as the factual backdrop of the Court's decision."
>
> (821 F.2d at 1166)

Where a party litigant in any venue dispute in Louisiana fails to properly challenge venue but exploits the judicial process of the district court, that use constitutes a waiver of the venue issue. (See, *e.g.*, *Danny Weaver Logging v. Norwel Equip. Co.*, 766 So. 2d 701 (La. App. 2nd Cir. 2000), in which employment of the judicial process at the district court level was held to constitute a waiver of the venue issue). Where a Defendant in Louisiana does not take up jurisdictional and venue questions, but appears before the court to ask it to rule on other matters in the case, the venue issue is waived. *Morales v. Falcon*, 167 So. 109 (La. App. 1st Cir. 1936).

It is generally understood that, "A pending motion to transfer will be waived by actions invoking the judicial power of the court in a manner inconsistent with a continuing intention to insist upon the motion." *Gentry v. Tucker*, 891 S.W.2d 766, 768 (Tex. App. 1995). In the case at bar, prior to acquiring the right to pursue any dismissal for *forum non conveniens* in a maritime case under the amended version of LSA – C.C.P. art. 123, MHI and other Defendants filed *forum non conveniens* motions which were properly dismissed by the district court judge. The premature filing of *forum non conveniens* motions by Defendants does not make the dilatory motion to dismiss of November 2, 2000 timely. When it later acquired the right to seek a dismissal under *forum non conveniens* in June of 1999, Mitsubishi took no action, but instead repeatedly invoked the authority of the trial court with respect to discovery.

Under applicable jurisprudence, invoking of the jurisdiction of Civil District Court was wholly inconsistent with any apparent intention to revive the original and meritless *forum non conveniens* motions. Petitioner provides no authority for the view that invocation of jural authority between June 30, 1999 and November 2, 2000 constitutes anything except an acquiescence in the jurisdiction and venue of Civil District Court and a complete waiver of *forum non conveniens*. Petitioner cannot argue that the filing of premature *forum non conveniens* motions in 1994 and 1996 somehow render the November 2, 2000 motion to dismiss timely. Is Petitioner saying that since they filed premature *forum non conveniens* motions before they had a right to do so, that once they acquired the right to seek dismissal in June of 1999, any further delay is of no consequence?

Petitioner cannot rely on the original exceptions; they had to file anew, but waited an unconscionable amount of time to do so and, in the interim, repeatedly invoked the authority of the Court. Citing prematurely filed exceptions which had no legal basis at the time they were filed is of no moment in considering whether a subsequent motion was filed in a timely manner. The previously filed, improper motions do not in any way operate to suspend the time in which to assert a *forum non conveniens* motion.

III. LSA – C.C.P. ART. 123, AS AMENDED, IS UNCONSTITUTIONAL

(A) The Issue Of Constitutionality Was Properly Placed Before The Trial Court.

Petitioner, MHI, has placed the constitutionality of LSA – C.C.P. art. 123 squarely at issue by contending that

the statute had retroactive application. Retroactivity cannot be addressed outside of a constitutional context. It is a constitutional issue. Unfortunately, we cannot know how the Court may have reasoned on the constitutional issue because it failed to provide written reasons for judgment. On January 9, 2001, Plaintiffs filed their Motion for Rehearing on Constitutional Grounds, citing the retroactive application of art. 123 as a wrongful taking and denial of access to Courts, under Louisiana Constitution, Article I, Sections 2, 3 and 4 and the 7th and 14th Amendments to the United States Constitution. The constitutional complaint was, therefore, specifically pleaded by Plaintiffs and placed before the trial court prior to any appeal.

On February 8, 2001, the trial court took two actions: (1) it signed the judgment granting the motion to dismiss of MHI, and (2) denied Plaintiffs' motion for rehearing on constitutional grounds. Thereafter, Plaintiffs appealed, citing, *inter alia*, error in the trial court for failure to acknowledge constitutional deficiencies in the retroactive application of art. 123, as amended. Plaintiffs/Respondents specifically submitted an order to the trial court on a rule to show cause, which would have given the parties an opportunity prior to appeal to thoroughly brief this issue and present detailed oral argument to the trial court. Unfortunately, the trial court denied the motion without explanation, depriving Plaintiffs of the chance to show the court that its ruling violated Plaintiffs' constitutional rights.

(B) Retroactive Application Is Unconstitutional

Petitioner suggests that the retroactive application of LSA – C.C.P. art. 123 does not divest Plaintiffs/ Respondents of any accrued right because Plaintiffs can proceed in another forum. But (1) Petitioner does not show that Plaintiffs can, in fact, proceed in another forum, and (2) even if it were shown that this case could be prosecuted elsewhere in its totality, under the Louisiana Constitution and the laws of the State of Louisiana, Plaintiffs/Respondents have a right to proceed on their cause of action through the Louisiana courts. Louisiana Constitution, Art. 1, §2, §22.

Louisiana Constitution, Art. 1 §22 says: "All courts shall be open, and every person shall have an adequate remedy by due process of law and justice administered without denial, partiality or unreasonable delay, for injury to him in his person, property, reputation or other rights." At the commencement of this matter, therefore, under Art. 1, §22, Plaintiffs/Respondents had a substantive right to access the Louisiana courts as mandated by the state constitution.

The Louisiana Constitution protects the property rights of persons, and provides for due process of law in that regard. Article 1, §2 of the state constitution provides: "No person shall be deprived of life, liberty or property without due process of law. Similarly, the Fifth Amendment of the Constitution of the United States declares in the due process clause that: "[N]o person shall . . . be deprived of life, liberty or property without due process of law."

When Plaintiffs/Respondents acquired their cause of action, they had a vested right and under the Louisiana

Constitution, art. 1 §22; they had the right to pursue that cause of action in the Louisiana courts. At the time of the accident and of the filing of suit, no legal obstacle existed in terms of the principle of *forum non conveniens* which would bar Plaintiffs/Respondents from prosecuting their cause of action in Civil District Court and they did, in fact, exercise that right over a period of six years.

According to Professor A. N. Yiannopoulos, "Retroactive application of new legislation is constitutionally permissible only if it does not result in impairment of the obligation of contracts or in divestiture of vested rights." A. N. Yiannopoulos, *Louisiana Civil Law Treatise*, §10 3d Ed. (1991), p. 20. This is further explained in Yiannapoulous, *Louisiana Civil Law System* §40 (1977). There he notes: "As early as 1855, the Louisiana Supreme Court declared in *Municipality No. 1 v. Wheeler*, 10 La. Ann. 745 (1855), that 'retrospective laws in civil matters do not violate the Constitution unless they need to divest vested rights or to impair the obligation of contracts.'"

Comment (c) is as follows:

> "According to a well-settled rule of statutory interpretation, procedural and interpretative laws apply both prospectively and retroactively unless they violate vested rights or obligations of contracts. See *Ardoin v. Hartford Acc. & Indemnity Co.*, 360 So. 2d 1331 (La. 1978); *Barron v. State Dept. of Public Safety*, 397 So. 2d 29 (La. App. 2d Cir. 1981), *writ denied*, 401 So. 2d 1188." See also, La. Act of 1978, No. 728, §6. "But no provision may be applied to divest already vested rights or to impair the obligation of contracts."

If we turn from historical and jurisprudential authorities to recent pronouncements of Louisiana courts in this

area, we find guidance on how to treat attempts to apply laws retroactively so as to dissolve vested legal rights. Today, as before, the retroactive application of new legislation to vested rights and cases pending in which such vested rights are operative is constitutionally proscribed.

Providing some enlightenment on this point is *Bourgeois v. A.P. Green Industries, Inc.*, 783 So. 2d 1251 (La. 2001), handed down by the Louisiana Supreme Court on April 3, 2001. In *Bourgeois*, Plaintiffs were shipbuilders whose lawsuit, on the day filed, contained a claim for medical monitoring under LSA – C.C. art. 2315. On January 23, 1996, Plaintiffs in *Bourgeois* filed suit for medical monitoring. After the filing, the Louisiana legislature passed Act No. 989, effective July 9, 1999 (three years later) eliminating medical monitoring as a compensable item of damage. The act was inscribed as "interpretive" and further, it stated in Section 3 that, "The provisions of this Act shall be applicable to all claims existing or actions pending on its effective date and all claims arising or actions filed on or after its effective date." The issue before the Louisiana Supreme Court was whether act No. 989, as applied retroactively to the *Bourgeois* Plaintiffs, comported with the United States and Louisiana Constitutions.

The Louisiana Supreme Court acknowledged that art. 989 was declared by the legislature to be retroactive. However, that could not be the determinative consideration on constitutional review. Even where the legislature expresses its intent to give a law retroactive effect, that law may not be applied retroactively if doing so would operate to disturb vested rights.

In deciding for the Plaintiffs, the Court reasoned as follows:

The legislature's power to enact retroactive laws is limited by the Due Process and Contract Clauses of the Federal and State Constitutions. U.S. Const. amend. XIV, §1; U.S. Const. art. I, §10[1]; La. Const. art. I, §2; La. Const. art. 1, §23; See also *Segura*, 93-1271 at p. 19-20, 630 So. 2d at 728, and cases cited therein. Plaintiffs contend retroactive application of Act 989 to their claims would contravene due process guarantees by divesting them of their vested rights in their causes of action which accrued prior to the effective date of the Act. We agree.

When a party acquires a right to assert a cause of action prior to a change in the law, that right is a vested property right which is protected by the guarantee of due process. *Walls v. American Optical Corp.*, 98-0455, p. 8 (La. 9/8/99), 740 So. 2d 1262, 1268. See also *Cole*, 599 So. 2d at 1063; *Crier v. Whitecloud*, 496 So. 2d 305, 308 (La. 1986); *Faucheaux v. Alton Ochsner Medical Found. Hosp. & Clinic*, 470 So. 2d 878, 878-79 (La. 1985); *Lott*, 370 So. 2d at 524; *Burmaster v. Gravit Drainage Dist. No. 2*, 366 So. 2d 1381, 1387 (La. 1978). Thus, a cause of action, once accrued, cannot be divested by subsequent legislation. See e.g. *Faucheaux*, 470 So. 2d at 879 ("The statutes enacted after the acquisition of such a vested property right . . . cannot be retroactively applied so as to divest the plaintiff of his vested right in his cause of action because such a retroactive application would contravene the due process guaranties."); *Terrebonne v. South Lafourche Tidal Control Levee Dist.*, 445 So. 2d 1221, 1224 (La. 1984) ("This vested right could not be impaired by subsequent legislation. The Legislature simply cannot take away an existing cause of action based upon substantive rights

which had clearly been granted by legislation during the preceding session and had become vested on the effective date of the legislation."); *Favrot v. Parish of East Baton Rouge*, 34 La. Ann. 491 (La. 1882) ("Plaintiff cannot be deprived of his [vested] right by mere legislative action."). Under Louisiana law, a cause of action accrues when a party has the right to sue. *Falgout v. Dealers Truck Equip. Co.*, 98-3150, p. 12 (La. 10/19/99), 748 So. 2d 399, 407 ("When a party acquires a right, either to sue for a cause of action or to defend himself against one, that right becomes a vested property right and is protected by the due process guarantees."); *Prejean v. Dixie Lloyds Ins. Co.*, 94-2979, p. 3 (La. 9/15/95), 660 So. 2d 836, 837 ("In Louisiana, a cause of action accrues when a party has a right to sue."); *Cole*, 599 So. 2d at 1063 n.15 ("Under Louisiana law, a cause of action accrues when the party has the right to sue."). We must therefore determine whether plaintiffs had an accrued cause of action, i.e., the right to sue, prior to the effective date of Act 989.

Because a cause of action for medical monitoring of asymptomatic plaintiffs existed prior to the effective date of Act 989, plaintiffs have a vested right to assert their causes of action for medical monitoring if those rights accrued prior to July 9, 1999. A cause of action, for purposes of the peremptory exception, "means the operative facts which give rise to the plaintiff's right to judicially assert the action against the defendant." *Everything on Wheels Subaru, Inc. v. Subaru South, Inc.*, 616 So. 2d 1234, 1238 (La. 1993).

The Louisiana Supreme Court, therefore, found that Plaintiffs had a vested property right in their accrued

causes of action which could not constitutionally be divested by Act 989. The decision of the trial court declaring Act 989 unconstitutional as applied to Plaintiffs' claims was, therefore, affirmed. The legislative dictum that Act No. 989 was applicable to "all claims existing or actions pending on its effective date" did nothing in the eyes of the Louisiana Supreme Court to cure the constitutional defect.

The *Bourgeois* case is plainly on all fours with the case at bar. Coincidentally, year 1999 saw the passage of both acts, No. 989 as well as the act which concerns this case, No. 536. Defendants sought to apply both acts retroactively to defeat extant, accrued rights of Plaintiffs whose suit had been in litigation for years. The facts are virtually indistinguishable. In the case at bar, Plaintiffs/Respondents acquired vested rights at the time their decedents lost their lives. As the Louisiana Supreme Court observed in *Walls v. American Optical Corp.*, 740 So. 2d 1262 (La. 1999):

> [I]n order for the plaintiffs in this case to succeed in their argument that the amendment operates retroactively, they must have acquired a vested right in the course of action prior to the statute's effective date. A negligence cause of action will only arise upon the happening of a wrongful act and the existence of an injury resulting in legally cognizable damages.

That is, the cause of action is coterminous with the injury. As the Supreme Court noted in *Walls, supra*, Plaintiffs' injury in a wrongful death action occurs when the victim dies. That is when the cause of action accrues, for that is when Plaintiffs first have a right to sue upon a loss. A cause of action accrues when a suit may first be legally

instituted upon it. *Rogues v. Continental Casualty Co.*, 135 So. 51 (Ct. App. Orl. 1931).

Similar logic is found in *Lovette v. Security Industrial Ins. Co.*, 361 So. 2d 1348 (La. App. 3d Cir. 1978):

> A cause of action does not "accrue" until suit may be legally instituted upon it, that is, when it becomes immediately enforceable. *Grice v. Aetna Casualty and Surety Company*, 353 So. 2d 401 (La. App. 4th Cir. 1977), reversed on other grounds, 359 So. 2d 1288 (La. 1978), rendered June 19, 1978; *Rogues v. Continental Casualty Co.*, 17 La. App. 465, 135 So. 51 (La. App. Orl. 1931). Webster's Third New International Dictionary (1961 ed.) defines the term "accrue" in pertinent part as:
>
> "to come into existence as an enforceable claim: vest as a right (a cause of action has accrued when the right to sue has become vested)."

Thus, Plaintiffs/Respondents in the case at bar acquired a vested right in the cause of action in negligence on the day the *M/V MARIKA* went down and their decedents perished. But the "cause of action" is at the same time a right to bring legal action in the courts of the state of Louisiana as provided for in Louisiana Constitution article 1 §22. No right could be more substantive than the right to bring a legal action in court. When the M/V MARIKA sank, Plaintiffs/Respondents immediately acquired vested rights – rights which the trial court ignored in applying the amendments to LSA – C.C.P. art. 123 retroactively to deprive Plaintiffs of their chosen forum.

Further, if in *Bourgeois* the Louisiana Supreme Court struck down as unconstitutional a new law expressly

stamped by the legislature as applying to present and pending actions, *a fortiori*, in the situation of a statute not so designated as applying to pending cases (Act. 536 of 1999), it is self-evident that as applied to Plaintiffs with pre-existing vested rights, those rights are protected by constitutional guarantees and are immune to legislative tampering.

When the M/V MARIKA sank, Plaintiffs/Respondents acquired a cause of action under federal and Louisiana laws which they are entitled to pursue under Louisiana's Constitution in Louisiana's courts. That is a foundational, substantive, civil right which vested at the time of the loss. Plaintiffs/Respondents have been diligently exercising that particular civil right for seven years. To enact a statute in the midst of that litigation which cuts off that right of access to court, a right which these litigants have enjoyed for seven years, is not a matter of mere "procedure," as Petitioner would have it; it is a matter of substance, it touches the heart of Plaintiffs'/Respondents' civil remedy and deprivation of that right after the fact is a violation of elementary due process. It is little comfort to the banished in exile to say that there are several lands to which he or she might go. Nor does the fact that he or she might go there render this plight merely a matter of "procedure." The United States Fifth Circuit Court of Appeals recognized in *Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983) that right of access to the courts is a substantive right and that interference which deprives wrongful death Plaintiffs of that substantive right is a denial of due process.

Petitioner does not demonstrate in its brief that the right to pursue an acquired cause of action in Louisiana is a merely "procedural" right. Nor does the fact that *forum*

non conveniens is a procedural remedy imply that it may be utilized in Louisiana retroactively to cases pending in litigation in which the Plaintiffs have been exercising acquired substantive causes of action for seven years. It is respectfully submitted that the retroactive application of a "procedural" statute cannot be carried out where to do so would deprive Plaintiffs of a substantive right to proceed in suit in Louisiana. *Ryland v. Shapiro, supra.*

IV. PETITIONER HAS FAILED TO CONSIDER THE AGE AND HISTORY OF THIS CASE

A motion to dismiss for *forum non conveniens* is a preliminary consideration to be addressed at the threshold of litigation. By granting meritorious *forum non conveniens* motions, courts spare the parties the needless cost of litigation in a remote tribunal. But, where a substantial portion of the litigation has already been conducted, however, the motion to dismiss on grounds of *forum non conveniens* has far less significance. As Wright, Miller & Cooper have remarked, " . . . if the litigation has progressed significantly . . . a defendant's belated assertion that the forum is not convenient is likely to be viewed dimly by the court." Wright, Miller & Cooper, *Jurisdiction*, §3828.

In the present matter, the enormous record of ten volumes speaks for itself. Plaintiffs/Respondents spent more than $8,000 just to produce this record for review by the appellate court. Plainly, a lot of water has passed under the bridge, making a transfer at this juncture illogical. Defendant/Petitioner has enjoyed the benefits of the American system of jurisprudence and court approved discovery for seven full years, and has performed and

participated in extensive discovery. It is well established that the amount of discovery is an important factor to be weighed in determining whether a case should be dismissed for *forum non conveniens*. *Delgado v. Shell*, 890 F. Supp. 1324 (S.D. Texas, 1995). Among the depositions taken thus far are: (1) Paul Francis Daniels, 490 pages; (2) Christos Nomikos; (3) Avondale Industries, Inc.; (4) The Salvage Association, Ltd.; (5) George Gyftakis, 8 vol. video deposition; and (6) Thomas Hidder, Sanwa Bank, Chicago, Illinois.

Most of the massive written discovery and liability depositions have been taken. Only the damages need to be assessed via Plaintiffs' depositions, plus the deposition of MHI itself. This deposition will be taken in Japan. It will be a necessary inconvenience for all of the parties except MHI. Plaintiffs have offered to defray the costs to Defendants of taking numerous depositions in the Philippines. Considering the vast amount of discovery already carried out, a transfer to any foreign tribunal now would be senseless. A court should dismiss on the basis of *forum non conveniens* only where trial in the United States would be unjust or oppressive, not merely inconvenient for Defendants. *Complaint of Maritima Aragua, S.A. v. M/T Trade Resolve*, 823 F. Supp. 143 (S.D.N.Y. 1993). Given the fact that MHI is in Japan, if this case were transferred, say, to Greece or the Philippines, it is not clear why these venues would be any less "unjust and oppressive" than the present situs where the parties have litigated for seven years.

Petitioner cannot deny that this matter has been in Civil District Court for seven years. Nor can they deny that it is well-recognized that "if the litigation has progressed significantly . . . a defendant's belated assertion that the forum is not convenient is likely to be dimly

viewed by the Court." Wright, Miller, Cooper, *Jurisdiction*, §3828. A great deal of discovery, both in written and testimonial form, has already been completed. After six years of litigation, the Legislature amended art. 123 in June of 1999 to allow for *forum non conveniens* dismissal in maritime cases. Instead of moving for dismissal in 1999, MHI continued to pursue discovery issues and even seek sanctions against Plaintiffs/Respondents at the trial court level. Now, after invoking the authority of the district court to issue orders, including sanctions against Plaintiffs, over a 16 month period, in addition to several years of litigation already undertaken, MHI turns around and seeks a dismissal based on *forum non conveniens*. But this maneuver cannot succeed; it simply comes too late. Petitioner cannot cite a single legal precedent from any jurisdiction that stands for the proposition that where a case has been lodged in a court for seven years and Defendant has had a right to seek dismissal for nearly a year and a half but does not act on it, that the motion to dismiss filed as an afterthought should be granted. There is no authority for the granting of such a motion.

V. PETITIONER HAS IGNORED THE FACT THAT DISCOVERY THROUGH THE COURTS OF ANY OTHER NATION WILL REQUIRE TRAVEL

There is additional discovery needed in this case which will require travel by the parties. But Petitioner does not explain under what scenario extensive travel could be eliminated or even reduced. Travel would not be eliminated if this suit were lodged in Canada. Foreign witnesses would still need to be deposed. The same is true of all other proposed forum nations. In international

litigation there is always going to be travel in order to perform discovery. The question is whether the travel costs attendant upon completion of the litigation in the United States, when compared with the travel costs if the litigation is lodged in some other nation, is greater and somehow fundamentally unfair to Petitioner. Petitioner fails to show that keeping the case in Louisiana would, in fact, necessitate more travel for the parties than if the case were situated in the Philippines or any other country. *Forum non conveniens* cannot be granted on the basis of Petitioner's self-serving speculation. Thus far, depositions have been taken in the United States and in Greece. Additional depositions need to be taken in the United States, Canada, Greece, the Philippines and Japan. There is no evidence that removal of this matter outside the United States will make completion of these depositions any less time consuming or more economical for the parties.

VI. CONCLUSION

Petitioner has failed to meet its burden of showing the existence of an adequate, available alternative forum that would accept this litigation. Without the requisite proof that such a forum exists and would accept the litigation, a motion on *forum non conveniens* cannot be granted. In addition to the fact that this litigation was pending for some seven years prior to the amendment of LSA – C.C.P. art. 123, Petitioner waited some sixteen additional months after the amendment to move for dismissal.

During this entire period of time, Petitioner availed itself of the jurisdiction and remedies afforded by the very

court from which it now seeks escape. Respondents respectfully submit that Petitioner has waived its right to assert a motion to dismiss based upon *forum non conveniens*.

Where a significant amount of the litigation has already been undertaken by the parties, there can be no showing of judicial economy or convenience to the parties such that it would be feasible to dismiss and re-file an action in an alternative forum. Most of the liability depositions have been taken and, for the most part, only damages depositions remain to be taken. Considering the age and posture of this matter, nothing can be gained by a transfer to any of the suggested *fora*.

Respondents, therefore, respectfully urge this Honorable Court to deny Petitioner's Petition for a Writ of Certiorari.

Respectfully Submitted,

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